# THE GENERAL STATUTES OF NORTH CAROLINA



## RULES

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

*Under the Direction of*

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**JUNE 1986 SUPPLEMENT**

**Place Inside Back Cover of 1985 Rules Volume.**

THE MICHIE COMPANY
*Law Publishers*
CHARLOTTESVILLE, VIRGINIA
1986

# Preface

This June 1986 Supplement to the 1985 edition of the Annotated Rules of North Carolina contains provisions of the rules set out therein which have been added, amended, or deleted by orders promulgated through May 1, 1986. It also contains annotations supplemental to those appearing in the 1985 edition. For a complete scope of the contents of the 1985 edition, see pages v and vi thereof.

This supplement has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

LACY H. THORNBURG
*Attorney General*

*June 1, 1986*

**Annotations:**

Source of annotations to the rules of practice in all courts:
North Carolina Reports through Volume 315, p. 397.
North Carolina Court of Appeals Reports through Volume 78, p. 808.
South Eastern Reporter 2nd Series through Volume 340, p. 842.
Federal Reporter 2nd Series through Volume 785, p. 1037.
Federal Supplement through Volume 628, p. 1583.
Federal Rules Decisions through Volume 109, p. 239.
Bankruptcy Reports through Volume 58, p. 152.
Supreme Court Reporter through Volume 106, p. 1394.
North Carolina Law Review through Volume 64, p. 441.
Wake Forest Law Review through Volume 20, p. 1058.
Campbell Law Review through Volume 8, p. 166.
Duke Law Journal through 1985, p. 1076.
North Carolina Central Law Journal through Volume 15, p. 313.
Opinions of the Attorney General.

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## 3. Continuances.

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

## 6. Motions in Civil Actions.

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

## 7. Pre-Trial Procedure. (See Rule 16)

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

## 10. Opening and Concluding Arguments.

CASE NOTES

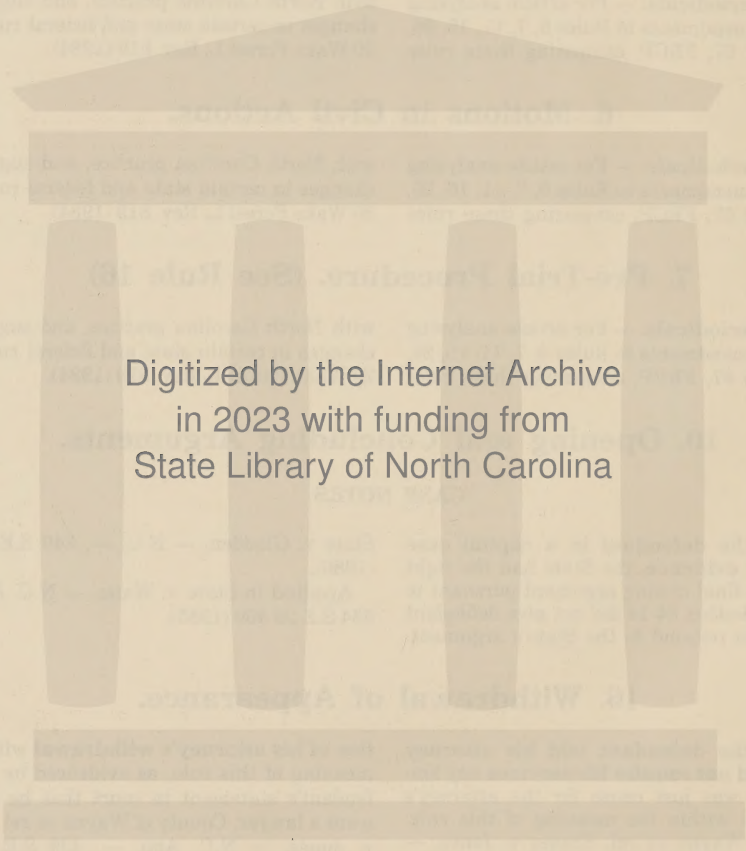
**Where the defendant in a capital case presented evidence,** the State had the right to give the final closing argument pursuant to this rule. Section 84-14 did not give defendant the right to respond to the State's argument. State v. Gladden, — N.C. —, 340 S.E.2d 673 (1986).

**Applied** in State v. Watts, — N.C. App. —, 334 S.E.2d 400 (1985).

## 16. Withdrawal of Appearance.

**Where the defendant told his attorney that he did not require his services** any longer, there was just cause for the attorney's withdrawal within the meaning of this rule. County of Wayne ex rel. Scanes v. Jones, — N.C. App. —, 339 S.E.2d 435 (1986).

**The defendant received reasonable notice of his attorney's withdrawal** within the meaning of this rule, as evidenced by the defendant's statement in court that he did not want a lawyer. County of Wayne ex rel. Scanes v. Jones, — N.C. App. —, 339 S.E.2d 435 (1986).



# NORTH CAROLINA RULES OF APPELLATE PROCEDURE

## ARTICLE I. APPLICABILITY OF RULES

### Rule 2

### Suspension of Rules

CASE NOTES

**Residual Power to Consider Important Issues.** — On rare occasions, when issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, the Supreme Court will exercise its inherent residual power or its authority under this rule and address those issues, even though they are not properly raised on appeal. This residual power to suspend or vary operation of the court's published rules does not depend on express reservation by the court in its body of rules, but is included in the rules as a reminder to counsel that the power exists and may be drawn upon where the justice of doing so or the injustice of failing to do so appears manifest to the court. Blumenthal v. Lynch, — N.C. —, 340 S.E.2d 358 (1986).

**Consideration of Issue Not Raised in Dissent.** — Under § 7A-30(2), only the issue raised in the dissent is properly before the Supreme Court for review. Rule 16 defines the permissible scope of review in such cases. Nevertheless, additional issues which arise frequently in the administration of estates and must often be determined by the Department of Revenue would be considered under the court's residual power or authority under this rule. Blumenthal v. Lynch, — N.C. —, 340 S.E.2d 358 (1986).

**Where plaintiff in worker's compensation case, proceeding in forma pauperis, failed to present any assignments of error** within the record, and neither the exceptions nor assignments of error which plaintiff relied on were set forth at the conclusion of the record on appeal, the Court of Appeals, in order to prevent any manifest injustice to plaintiff, would nonetheless review the merits of his appeal. Swindell v. Davis Boat Works, Inc., — N.C. App. —, 337 S.E.2d 592 (1985).

**Applied** in N.C. Coastal Motor Line v. Everette Truck Line, — N.C. App. —, 334 S.E.2d 499 (1985); State v. O'Neal, — N.C. App. —, 335 S.E.2d 920 (1985); State v. Hosey, — N.C. App. —, 339 S.E.2d 414 (1986); Bailey v. LeBeau, — N.C. App. —, 339 S.E.2d 460 (1986); State v. Hamlet, — N.C. —, 340 S.E.2d 418 (1986); Carefree Carolina Communities, Inc. v. Cilley, — N.C. App. —, 340 S.E.2d 529 (1986); State v. Smith, — N.C. —, 337 S.E.2d 833 (1985); State v. Hunter, — N.C. —, 338 S.E.2d 99 (1986); In re Johnson, — N.C. —, 338 S.E.2d 104 (1986).

## ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

### Rule 3

### Appeal in Civil Cases — How and When Taken

CASE NOTES

I. IN GENERAL.

**The provisions of § 1-279 and this rule etc.** —

In accord with 3rd paragraph in 1985 Rules Volume. See Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., — N.C. App. —, 337 S.E.2d 685 (1985).

**Withdrawal of § 1A-1, Rule 59 motion did not entitle defendants 10 days from their withdrawal** to file notice of appeal from judgment; to hold otherwise would thwart the

tolling provision of section (c) of this rule, and circumvent § 1A-1, Rule 58, i.e., to give all interested parties a definite fixed time of a judicial determination that they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., — N.C. App.—, 337 S.E.2d 685 (1985).

Motion under § 1A-1, Rule 59 to amend judgment, filed 10 days after judgment by defendant, tolled the time for filing and serving a cross-notice of appeal until entry of an order on the motion pursuant to section (c) of this rule. However, where defendants later withdrew their Rule 59 motion, the 10 day time limit to give notice of appeal under section (c) was not tolled, because there was never a judicial determination on defendants' motion. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., — N.C. App. —, 337 S.E.2d 685 (1985).

# Rule 9

# The Record on Appeal

## CASE NOTES

### I. IN GENERAL.

**Weapon Added to Record on Appeal.** — Where the court admitted the weapon (a box cutter) itself into evidence, while a verbal description supplemental to introduction of the weapon would have been preferable, its omission was not fatal; pursuant to subsection (b)(5) of this rule, the appellate court would order the box cutter sent up and added to the record on appeal. State v. Wiggins, — N.C. App. —, 337 S.E.2d 198 (1985).

**Dismissal of Appeal.** — Where plaintiffs failed to place any exceptions or assignments of error in the record on appeal, the appeal would be dismissed. Ellis v. Williams, — N.C. App. —, 337 S.E.2d 188 (1985).

**Applied** in In re Bass, — N.C. App. —, 334 S.E.2d 779 (1985).

# Rule 10

# Exceptions and Assignments of Error in Record on Appeal

## CASE NOTES

### I. IN GENERAL.

**When a conflict arises between a subsection of § 15A-1446 and this rule,** the rule should control. State v. O'Neal, — N.C. App. —, 335 S.E.2d 920 (1985).

**Subdivision (b)(2) Mandatory.** —

In accord with the 1985 Rules volume. See Mills v. New River Wood Corp., — N.C. App. —, 335 S.E.2d 759 (1985).

**Section (b)(2) of this rule and Rule 21, etc.** —

In accord with the 1985 Rules volume. See Mills v. New River Wood Corp., — N.C. App. —, 335 S.E.2d 759 (1985).

**Where plaintiffs failed to place any exceptions or assignments of error in the record on appeal,** the appeal would be dismissed. Ellis v. Williams, — N.C. App. —, 337 S.E.2d 188 (1985).

**Burden of Showing Right to Review.** — When a defendant contends that an exception, in the words of subdivision (b)(1) of this rule, "by rule or law was deemed preserved or taken without" objection made at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error. In so doing, he must alert the appellate court to the fact that no action was taken by counsel at trial and then establish his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court. State v. Gardner, — N.C. —, 304 S.E.2d 701 (1986).

**Plain Error.** —

The "plain error" rule, adopted in State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983) as an exception to subsection (b)(2) of this rule, provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. State v. Lilley, — N.C. App. —, 337 S.E.2d 89 (1985).

The plain error rule waives subsection (b)(2) of this rule and allows review of fundamental errors or defects in jury instructions affecting substantial rights which were not brought to the attention of the trial court. State v. Rathbone, — N.C. App. —, 336 S.E.2d 702 (1985).

**The plain error rule is always to be applied cautiously, etc. —**

The plain error rule will be applied only in exceptional circumstances where the error was sufficiently fundamental and prejudicial to amount to a miscarriage of justice or the denial of a fair trial, or where it can fairly be said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Harris, — N.C. —, 340 S.E.2d 383 (1986).

The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Riddle, — N.C. —, 340 S.E.2d 75 (1986); State v. Walker, — N.C. —, 340 S.E.2d 80 (1986); State v. Morgan, — N.C. —, 340 S.E.2d 84 (1986).

Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. State v. Torain, — N.C. —, 340 S.E.2d 465 (1986); State v. Gardner, — N.C. —, 340 S.E.2d 701 (1986).

**In order for the Supreme Court to grant a new trial under the "plain error" exception** to section (b)(2) of this rule, a judge's charge must be so fundamentally flawed that it can be fairly said that the mistake probably had an impact on the defendant's conviction. State v. Wrenn, — N.C. —, 340 S.E.2d 443 (1986).

**The test for "plain error" places a much heavier burden upon defendant than that imposed by § 15A-1443** upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. State v. Gardner, — N.C. —, 340 S.E.2d 701 (1986).

**Burden in Asserting Plain Error.** — The test for "plain error" places a much heavier burden upon the defendant than that imposed by § 15A-1443 upon defendants who have preserved their rights by timely objection. State v. Walker, — N.C. —, 340 S.E.2d 80 (1986); State v. Morgan, — N.C. —, 340 S.E.2d 84 (1986).

**Plain error in the context of jury instructions** occurs when the instructional mistake had a probable impact on the jury's finding that defendant was guilty. If this occurred, such a plain error would deprive defendant of his fundamental right to a fair trial. State v. Grainger, — N.C. App. —, 337 S.E.2d 77 (1985).

The plain error rule does not negate subsection (b)(2) of this rule, and rarely will an improper instruction which was not objected to at trial justify reversal. State v. Rathbone, — N.C. App. —, 336 S.E.2d 702 (1985).

Even after the adoption of the "plain error" rule, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Lilley, — N.C. App. —, 337 S.E.2d 89 (1985).

It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Morgan, — N.C. —, 340 S.E.2d 84 (1986).

A prerequisite to the court engaging in a "plain error" analysis is the determination that the instruction complained of constitutes "error" at all. State v. Torain, — N.C. —, 340 S.E.2d 465 (1986).

**Plain Error Not Shown.** — Where the trial judge's initial instruction created the mistaken impression that to convict defendant of murder, defendant himself must have actually done the shooting, and to convict defendant of attempted armed robbery, defendant had to have been holding the gun, and only the next morning did the judge correctly instruct the jury as to the elements of the crimes under a theory of acting in concert, the initial instruction was in fact favorable to defendant, and the plain error rule would not be applied thereto. State v. Harris, — N.C. —, 340 S.E.2d 383 (1986).

While defendant's constitutional rights were violated when the prosecutor cross-examined him concerning his silence after he was arrested and advised of his constitutional rights, given the peculiar facts of the case, such error did not cause the jury to reach a different verdict than it would have reached otherwise. Therefore, the defendant did not carry his burden of showing "plain error." State v. Walker, — N.C. —, 340 S.E.2d 80 (1986), indicating, however, that such prosecutorial tactics may often amount to "plain error" and require a new trial.

Although it was error for the trial court not to instruct the jury as to defendant's right to stand his ground if it believed his testimony and found that he was not the aggressor, where this error was not properly preserved for review by reason of defendant's failure to comply with section (b)(2) of this rule, upon review of the record as a whole, such error did not constitute "plain error." State v. Morgan, — N.C. —, 340 S.E.2d 84 (1986).

**Instructions on Self-Defense.** — Subsection (b)(2) of this rule does not alter the rule of State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980), holding that where competent evidence is presented, the trial judge must give self-defense and "no duty to retreat" instructions even absent a specific request. However, it operates to preclude a defendant from assigning as error on appeal a trial judge's failure to so instruct unless defendant preserves the error by making a timely objection at trial. State v. Morgan, — N.C. —, 340 S.E.2d 84 (1986).

**Failure to Object to Jury Instructions.** — In accord with 2nd paragraph in the 1985 Rules volume. See Martin v. Hare, — N.C. App. —, 337 S.E.2d 632 (1985).

Failure to object to the instructions given constitutes a waiver of the right to challenge the instructions on appeal. Chastain v. Wall, — N.C. App. —, 337 S.E.2d 150 (1985).

**Review of Instructions to Determine If Plain Error Was Committed.** — Where instructions were not objected to before the jury retired, as required by subsection (b)(2) of this rule, court would review them only for the limited purpose of determining whether "plain error" was committed. State v. Tabron, — N.C. App. —, 337 S.E.2d 186 (1985).

**Failure to Except to Findings of Fact.** — When no exceptions are made to separate findings of fact, they are presumed to be supported by competent evidence. State v. Perry, — N.C. —, 340 S.E.2d 450 (1986).

**Appeal Reduced to Broadside Attack.** — Where defendant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law, and correctly assigned error individually to each excepted finding and conclusion, but then, rather than direct the Court of Appeals to the particular findings he challenged, he instead argued the general denial of his Rule 41(b) motion, he thereby reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Therefore the only question presented was whether the findings of fact supported the conclusions of law and whether the conclusions supported the judgment. Concrete Serv. Corp. v. Investors Group, Inc., — N.C. App. —, 340 S.E.2d 755 (1986).

**Waiver of Right to Challenge Sufficiency of Evidence as to Particular Findings.** — On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, then state which assignments support which questions in the brief. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. Concrete Serv. Corp. v. Investors Group, Inc., — N.C. App. —, 340 S.E.2d 755 (1986).

**Assignment of Error Held Sufficient.** — Assignment of error stating that the trial judge erred in his utilization of a 1946 conviction, opinion statements by police officers and other improper factors in determining aggravating factors during the sentencing of the defendant was sufficient to state the basis upon which error was assigned, although more detail would have been helpful. State v. Perry, — N.C. —, 340 S.E.2d 450 (1986).

**Where plaintiff in worker's compensation case, proceeding in forma pauperis, failed to present any assignments of error** within the record, and neither the exceptions nor the assignments of error which plaintiff relied on were set forth at the conclusion of the record on appeal, the Court of Appeals, in order to prevent any manifest injustice to plaintiff, would nonetheless review the merits of his appeal. Swindell v. Davis Boat Works, Inc., — N.C. App. —, 337 S.E.2d 592 (1985).

**Issue Not Preserved by Cross-Assignment.** —

Where defendants did not appeal from judgment, challenges thereto were not properly raised by cross-assignments of error, which under section (d) of this rule are reserved for errors which deprived the appellee of an alternative basis in law for supporting the judgment. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., — N.C. App. —, 338 S.E.2d 135 (1986).

**Applied** in State v. Hensley, — N.C. App. —, 334 S.E.2d 783 (1985); State v. Torres, — N.C. App. —, 335 S.E.2d 34 (1985); Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., — N.C. App. —, 335 S.E.2d 335 (1985); State v. Heath, — N.C. App. —, 335 S.E.2d 350 (1985); State v. Hamilton, — N.C. App. —, 335 S.E.2d 506 (1985); State v. Davidson, — N.C. App. —, 335 S.E.2d 518 (1985); Livermon v. Bridgett, — N.C. App. —, 335 S.E.2d 753 (1985); State v. Elliott, — N.C. App. —, 335 S.E.2d 774 (1985); Hall v. Mabe, — N.C. App. —, 336 S.E.2d 427 (1985); Bradley v. Bradley, — N.C. App. —, 336 S.E.2d 658 (1985); State v. Bright, — N.C. App. —, 337 S.E.2d 87 (1985); DeHart v. R/S Fin. Corp., — N.C. App. —, 337 S.E.2d 94 (1985); State v. McNeill, — N.C. App. —, 337 S.E.2d 172 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., — N.C. App. —, 337 S.E.2d 174 (1985); State v. Howard, — N.C. App. —, 337 S.E.2d 598 (1985); State v. Covington, — N.C. —, 338 S.E.2d 310 (1986); State v. Litchford, — N.C. App. —, 338 S.E.2d 575 (1986); Andrews v. Andrews, — N.C. App. —, 338 S.E.2d 809 (1986); State v. McCoy, — N.C. App. —, 339 S.E.2d 419 (1986); Tatum v. Tatum, — N.C. App. —, 339 S.E.2d 817 (1986).

**Quoted** in State v. George, — N.C. App. —, 336 S.E.2d 93 (1985).

**Cited** in N.C. Coastal Motor Line v. Everette Truck Line, — N.C. App. —, 334 S.E.2d 499

(1985); State v. Green, — N.C. App. — , 335 S.E.2d 176 (1985); Dewey v. Dewey, — N.C. App. —, 336 S.E.2d 451 (1985); Pittman v. Inco, Inc., — N.C. App. —, 336 S.E.2d 637 (1985); State v. Davis, — N.C. App. —, 338 S.E.2d 579 (1986); State v. Hosey, — N.C. App. —, 339 S.E.2d 414 (1986); State v. Sessoms, — N.C. App. —, 339 S.E.2d 458 (1986); State v. McCullough, — N.C. App. —, 340 S.E.2d 132 (1986); State v. Hamlet, — N.C. —, 340 S.E.2d 418 (1986); State v. Gladden, — N.C. —, 340 S.E.2d 673 (1986); Williams v. Gupton, 627 F. Supp. 669 (W.D.N.C. 1986); State v. Moore, — N.C. App. —, 340 S.E.2d 771 (1986).

## Rule 11

## Settling the Record on Appeal

### CASE NOTES

**Where plaintiffs failed to place any exceptions or assignments of error in the record on appeal,** the appeal would be dismissed. Ellis v. Williams, — N.C. App. —, 337 S.E.2d 188 (1985).

**Cited** in State v. Wrenn, — N.C. —, 340 S.E.2d 443 (1986).

## Rule 13

## Filing and Service of Briefs

### CASE NOTES

**Applied** in Burris v. Shumate, — N.C. App. —, 334 S.E.2d 514 (1985).

# ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

## Rule 16

## Scope of Review of Decisions of Court of Appeals

### CASE NOTES

**Scope of Review Limited, etc. —**

Under § 7A-30(2), only the issue raised in the dissent is properly before the Supreme Court for review. This rule defines the permissible scope of review in such cases. Blumenthal v. Lynch, — N.C. —, 340 S.E.2d 358 (1986), addressing, nevertheless, additional issues which arise frequently in the administration of estates and must often be determined by the Department of Revenue under the court's residual power or authority under Rule 2.

# ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

## Rule 18

## Taking Appeal; Record on Appeal—Composition and Settlement

### CASE NOTES

**Cited** in Pittman v. Inco, Inc., — N.C. App. —, 336 S.E.2d 637 (1985).

# ARTICLE V. EXTRAORDINARY WRITS

## Rule 21

## Certiorari

### CASE NOTES

#### I. IN GENERAL.

**Cited** in State v. Moore, — N.C. —, 340 S.E.2d 401 (1986); State v. Gardner, — N.C. —, 340 S.E.2d 701 (1986).

# ARTICLE VI. GENERAL PROVISIONS

## Rule 28

## Briefs: Function and Content

### CASE NOTES

#### I. IN GENERAL.

**Appellant Must Except to Each Finding or Conclusion Separately.** — On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, and then state which assignments support which questions in the brief. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. Concrete Serv. Corp. v. Investors Group, Inc., — N.C. App. —, 340 S.E.2d 755 (1986).

**Reduction of Appeal to Broadside Attack.** — Where defendant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law, and correctly assigned error individually to each excepted finding and conclusion, but then, rather than direct the Court of Appeals to the particular findings he challenged, he instead argued the general denial of his Rule 41(b) motion, he thereby reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Therefore the only question presented was whether the findings of fact supported the conclusions of law and the conclusions supported the judgment. Concrete Serv. Corp. v. Investors Group, Inc., — N.C. App. —, 340 S.E.2d 755 (1986).

**Applied** in State v. Allen, — N.C. App. —, 334 S.E.2d 410 (1985); Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., — N.C. App. —, 335 S.E.2d 335 (1985); State v. Hamilton, — N.C. App. —, 335 S.E.2d 506 (1985); Livermon v. Bridgett, — N.C. App. —, 335 S.E.2d 753

(1985); Sharpe v. Park Newspapers of Lumberton, Inc., — N.C. App. —, 337 S.E.2d 174 (1985); Uzzell v. Integon Life Ins. Corp., — N.C. App. —, 337 S.E.2d 639 (1985); Hawkins v. Webster, — N.C. App. —, 337 S.E.2d 682 (1985); Calloway v. Mills, — N.C. App. —, 338 S.E.2d 548 (1986); Holthusen v. Holthusen, — N.C. App. —, 339 S.E.2d 823 (1986); Cobb v. Cobb, — N.C. App. —, 339 S.E.2d 825 (1986); Mauney v. Morris, — N.C. —, 340 S.E.2d 397 (1986); Graham v. Mid-State Oil Co., — N.C. App. —, 340 S.E.2d 521 (1986).

**Quoted** in Akzona, Inc. v. Southern Ry., — N.C. — , 334 S.E.2d 759 (1985).

**Cited** in N.C. Coastal Motor Line v. Everette Truck Line, — N.C. App. —, 334 S.E.2d 499 (1985); Andrews v. Andrews, — N.C. App. —, 338 S.E.2d 809 (1986).

# Rule 30

# Oral Argument

### CASE NOTES

**Applied** in United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

# RULES, REGULATIONS AND ORGANIZATION OF THE NORTH CAROLINA STATE BAR

## Article IX.

*Discipline and Disbarment of Attorneys.*

Determination of Disability.

### § 25. Reinstatement.

CASE NOTES

**Cited** in Vann v. North Carolina State Bar, — N.C. App. —, 339 S.E.2d 97 (1986).

# APPENDIX H.

# PLAN OF CERTIFIED LEGAL SPECIALIZATION

**7. Minimum Standards for Certification of Specialists**

To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the Board for the particular area of specialty:

7.7 The Board may adopt uniform rules waiving the requirements of 7.4 and 7.5 for members of a Specialty Committee at the time the initial written examination for that specialty is given and permitting said members to file application to become a Board Certified Specialist in that specialty upon compliance with all other required minimum Standards for Certification of Specialists. Should such an applicant be certified by the Board as a specialist, said certification shall terminate on the earlier of (i) two years after said applicant ceases to be a member of the Specialty Committee; or (ii) when such person's examination results are determined. (Amended March 6, 1984; March 26, 1986.)

**Only Part of Section Set Out.** — As the rest of section 7 was not affected, it is not set out.

**13. Areas in which Certificates of Specialty May Be Granted**

There is hereby created, pursuant to [Article VI,] Section 5, Standing Committees of the Council, j [k] (3.2) of the Committee on Legal Specialization the following designated areas in which certificates of specialty may be granted:

1. Bankruptcy Law
2. Estate Planning and Probate Law
3. Real Property Law
   (a) Real property — residential
   (b) Real property — business, commercial, and industrial. (Added December 2, 1985.)

**14. Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, and Real Property Law.**

The standards for the specialties listed in Section 13 above are as follows:

I. *Standards for Certification as a Specialist in Bankruptcy Law*

1. Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Bankruptcy Law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. Definition of Specialty

The specialty of Bankruptcy Law is the practice of law dealing with all laws and procedures involving the rights, obligations and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions.

3. Recognition as a Specialist in Bankruptcy Law

If a lawyer qualifies as a specialist in Bankruptcy Law by meeting the standards set for the specialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Bankruptcy Law."

4. Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in Bankruptcy Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. Standards for Certification as a Specialist in Bankruptcy Law

Each applicant for certification as a specialist in Bankruptcy Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification as a specialist in Bankruptcy Law:

A. Licensure and Practice

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B. Substantial Involvement

An applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Bankruptcy Law.

1. Substantial involvement shall mean during the five (5) years preceding the application, the applicant has devoted an average of at least five hundred (500) hours a year to the practice of Bankruptcy Law, but not less than four hundred (400) hours in any one (1) year.
2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.
3. Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession:
   a. Service as a Judge of any Bankruptcy Court, service as a Clerk of any Bankruptcy Court, or service as a standing trustee.

b. Corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith.

c. Service as a Deputy or Assistant Clerk of any Bankruptcy Court, as a research assistant to a Bankruptcy Judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one (1) year of experience to meet the five (5) year requirement.

C. Continuing Legal Education

An applicant must have earned no less than thirty-six (36) hours of accredited continuing legal education (CLE) credits in Bankruptcy Law, during the three (3) years preceding application with not less than six (6) credits in any one (1) year.

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be a judge of any Bankruptcy Court.
2. A reference may not be related by blood or marriage to the applicant nor may the reference to a partner or associate of the applicant at the time of the application.
3. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E. Examination

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Bankruptcy Law.

1. Terms

The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the Specialty Committee.

2. Subject Matter

The examination shall cover the applicant's knowledge and application of the law in the following topics:

a. All provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;

b. The Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;

c. Bankruptcy crimes and immunity;

d. State laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the creation, perfection, enforcement, and priorities of secured claims; claim and delivery; and attachment and garnishment; and

e. Judicial interpretations of any of the above.

6. Standards for Continued Certification as a Specialist

The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A. Substantial Involvement

The specialist must demonstrate that, for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty as defined in Section 5.B.

B. Continuing Legal Education

Since last certified, a specialist must have earned no less than sixty (60) hours of accredited continuing legal education credits in Bankruptcy Law with not less than six (6) credits earned in any one (1) year.

C. Peer Review

The specialist must comply with the requirements of Section 5.D.

D. Time for Application

Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. Lapse of Certification

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. Suspension or Revocation of Certification

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 5.

7. Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in Bankruptcy Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

II. *Standards for Certification as a Specialist in Estate Planning and Probate Law*

1. Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Estate Planning and Probate Law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. Definition of Specialty

The specialty of Estate Planning and Probate Law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

3. Recognition as a Specialist in Estate Planning and Probate Law

If a lawyer qualifies as a specialist in Estate Planning and Probate Law by meeting the standards set for the specialty, a lawyer shall be

entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

4. Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in Estate Planning and Probate Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. Standards for Certification as a Specialist in Estate Planning and Probate Law

Each applicant for certification as a specialist in Estate Planning and Probate Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification as a Specialist in Estate Planning and Probate Law:

A. Licensure and Practice

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B. Substantial Involvement

The applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Estate Planning and Probate Law.

1. Substantial involvement shall be measured as follows:

a. Time Spent

During the five (5) years preceding the application, the applicant has devoted an average of at least five hundred (500) hours a year to the practice of Estate Planning and Probate Law, but not less than four hundred (400) hours in any one (1) year.

b. Experience Gained

During the five (5) years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) Counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) Prepared or supervised the preparation of (i) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minors' trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments, and (ii) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) Handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative

before the Clerk of Superior Court, guardianship, will contest, and declaratory judgment actions; and

(iv) Prepared, reviewed or supervised the preparation of Federal Estate Tax Returns, North Carolina Inheritance Tax returns, and Federal and State Fiduciary Income Tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.
3. Practice equivalent shall mean:
   a. Receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the Specialty Committee and the Board from an approved law school) may substitute for one (1) year of experience to meet the five (5) year requirement;
   b. Service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may substitute for one (1) year of experience to meet the five (5) year requirement; and
   c. Service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the Specialty Committee and the Board). Such service may be substituted for one (1) year of experience to meet the five (5) year requirement.

C. Continuing Legal Education

An applicant must have earned no less than seventy-two (72) hours of accredited continuing legal education (CLE) credits in Estate Planning and Probate Law during the three (3) years preceding application. Of the seventy-two (72) hours of CLE, at least forty-five (45) hours shall be in Estate Planning and Probate Law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.
2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E. Examination

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Estate Planning and Probate Law.

1. Terms
   The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the Specialty Committee.
2. Subject Matter
   The examination shall cover the applicant's knowledge and application of the law in the following topics:
   a. Federal and North Carolina gift taxes;
   b. Federal estate tax;
   c. North Carolina inheritance tax;
   d. Federal and North Carolina fiduciary income taxes;
   e. Federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;
   f. North Carolina law of wills and trusts;
   g. North Carolina probate law, including fiduciary accounting;
   h. Federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts;
   i. North Carolina law of business organizations, family law and property law as they may be applicable to estate planning transactions; and
   j. Federal and North Carolina tax law applicable to partnerships and corporations (including S Corporations) which may be encountered in estate planning and administration.

6. Standards for Continued Certification as a Specialist
   The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.
   A. Substantial Involvement
   The specialist must demonstrate that for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty, as defined in Section 5.B.
   B. Continuing Legal Education
      Since last certified, a specialist must have earned no less than one hundred twenty (120) hours of accredited continuing legal education credits in Estate Planning and Probate Law. Of the one hundred twenty (120) hours of CLE, at least seventy-five (75) hours shall be in Estate Planning and Probate Law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.
   C. Peer Review
      The specialist must comply with the requirements of Section 5.D.
   D. Time for Application
      Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. Lapse of Certification

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. Suspension or Revocation of Certification

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 4.

7. Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in Estate Planning and Probate Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

III. *Standards for Certification as a Specialist in Real Property Law*

1. Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Real Property Law, including the subspecialties of Real Property-Residential Transactions and Real Property-Business, Commercial and Industrial Transactions, as a field of law, for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. Definition of Speciality

The specialty of Real Property Law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases and determination of property rights. Subspecialties in the field are identified and defined as follows:

2.1 Real Property Law-Residential Transactions

The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition of residential real property by individuals.

2.2 Real Property Law-Business, Commercial and Industrial Transactions

The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer and disposition of residential, business, commercial and industrial real property.

3. Recognition as a Specialist in Real Property Law

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in Real Property Law by meeting the standards set for the Real Property Law-Residential Transactions subspecialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential Transaction." If a lawyer qualifies as a specialist in Real Property Law by meeting the standards set for the Real Property Law-Business, Commercial and Industrial Transactions, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Business, Commercial and Industrial Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for both the Real Property Law-Residential Transactions subspecialty and the Real Property Law-Business, Commercial and Industrial Transactions subspecialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential, Business, Commercial and Industrial Transactions."

4. Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in Real Property Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. Standards for Certification as a Specialist in Real Property Law

Each applicant for certification as a specialist in Real Property Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification in Real Property Law:

A. Licensure and Practice

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B. Substantial Involvement

An applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Real Property Law.

1. Substantial involvement shall mean during the five (5) years preceding the application, the applicant has devoted an average of at least five hundred (500) hours a year to the practice of Real Property Law, but not less than four hundred (400) hours in any one (1) year.
2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.
3. Practice equivalent means service as a law professor concentrating in the teaching of Real Property Law. Teaching may be substituted for one (1) year of experience to meet the five (5) year requirement.

C. Continuing Legal Education

An applicant must have earned no less than thirty-six (36) hours of accredited continuing legal education (CLE) credits in Real Property Law during the three (3) years preceding application with not less than six (6) credits in any one (1) year.

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of lawyers or judges, all of whom are familiar with the competence and qualifications of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee at the direction of the Board of the submitted references and other persons concerning the applicant's competence and qualifications.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.
2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E. Examination

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Real Property Law.

1. Terms

The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the Specialty Committee.

2. Subject Matter

The examination shall cover the applicant's knowledge in the following topics in Real Property Law or in such subspecialty or subspecialties as the applicant has elected:

a. Title examinations, property transfers, financing, leases, and determination of property rights;

b. The acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals; and

c. The acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

6. Standards for Continued Certification as a Specialist

The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A. Substantial Involvement

The specialist must demonstrate that, for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty as defined in Section 5.B.

B. Continuing Legal Education

The specialist must have earned no less than sixty (60) hours of accredited continuing legal education credits in Real Property Law as accredited by the Board with not less than six (6) credits earned in any one (1) year.

C. Peer Review

The specialist must comply with the requirements of Section 5.D.

D. Time for Application

Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. Lapse of Certification

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. Suspension or Revocation of Certification

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 5.

7. Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in Real Property Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification. (Added May 6, 1986.)

# Index to Rules, Regulations and Organization of the North Carolina State Bar

S

# RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

## CANON II

## A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.

### Rule 2.6 Fees for Legal Services.

**Legal Periodicals.** — For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

### Rule 2.8 Withdrawal from Employment.

CASE NOTES

**Compensation after Discharge.** — Where an attorney, employed under a fixed fee contract to render specific legal services, is discharged by his client prior to completion of the services for which he was employed, he is entitled to compensation for the reasonable value of the services rendered up to the time of his discharge. The reasonable value of such services is a question of fact to be determined in the light of the circumstances of each case. O'Brien v. Plumides, — N.C. App. —, 339 S.E.2d 54 (1986).

## CANON V

## A Lawyer Should Exercise Independent Professional Judgment on Behalf of His Client.

### Rule 5.3 Avoiding Acquisition of Interest in Litigation.

**Legal Periodicals.** — For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

# CANON X

## A Lawyer Should Strictly Preserve the Identity of Funds and Property Held in Trust.

### Rule 10.1 Preserving Identity of Funds and Property of a Client.

CASE NOTES

**Civil Liability.** — A breach of former DR 9-102, relating to preserving the identity of the funds and property of a client, in and of itself, would not be a basis for civil liability. McGee v. Eubanks, — N.C. App. —, 335 S.E.2d 178 (1985).

# NORTH CAROLINA SUPREME COURT LIBRARY RULES

Index follows these rules.

**Appendix I**

Official Register, State of North Carolina

## *Appendix I*

## OFFICIAL REGISTER, STATE OF NORTH CAROLINA

(12) The Director of the Office of Administrative Hearings. (Added November 28, 1972; amended July 24, 1980; June 21, 1984; March 18, 1986.)

**Only Part of Appendix Set Out.** — As the rest of the appendix was not affected by the amendment, it is not set out.

# Index to North Carolina Supreme Court Library Rules

O

# LOCAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Index follows these rules.



## Rule 11. Transcript order.

Upon receipt of an order for a transcript, the clerk of the Court of Appeals will prepare for the reporter a transcript order acknowledgment which will set forth the date the transcript order was received in the Clerk's Office and the transcript due date, computed from the order receipt date in accordance with the time limits set forth in the applicable district court reporter management plan. If the transcript order is correct in all respects, except for an order date error in the reporter's favor, no response will be required from the reporter. If the reporter believes that there is a problem with the transcript order, he or she must complete a copy of the acknowledgement form noting the problem and return it to the Court of Appeals within seven days of receipt of the form by the reporter, or within such further time as the Court of Appeals allows. The time for completion of the transcript will automatically cease to run until the problem has been remedied. The clerk of the Court of Appeals will send a new transcript order acknowledgement setting forth new transcript order and filing dates taking into account the delay caused by resolving the problem with the original transcript order. (Added effective April 9, 1986.)

## Rule 47. Disclosure of corporate affiliations and financial interest.

(d) Whenever a trade association is a party to an appeal, or an intervenor, it shall be the responsibility of counsel for the trade association to identify all members of the association, and all affiliates of those members who are publicly owned, in conformity with sections (a) through (c) above.
(Amended effective December 4, 1985.)

**Only Part of Rule Set Out.** — As the rest of the rule was not affected by the amendment, it is not set out.

# Index to Local Rules of the United States Court of Appeals for the Fourth Circuit

# INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Index follows these rules.



## I.O.P. 3.2. Docketing statement.

To assist counsel in giving prompt attention to the substance of an appeal, to help reduce the ordering of unnecessary transcript, and to provide the court at the commencement of an appeal with the information needed for effective case management, each party filing a notice of appeal for any direct or cross appeal must complete a docketing statement, using the form provided by the clerk of the district court. The clerk of the court of appeals will provide a similar form for petitions for review and applications for enforcement.

The docketing statement, accompanied by Copy 1 of the transcript order when applicable, must be filed in the court of appeals within ten (10) days of filing of the notice of appeal, with a copy served on the opposing party or parties, and a copy provided to the clerk of the district court. The docketing statement and the transcript order should be mailed together and they are deemed filed on the date of mailing with the U.S. Postal Service.

Docketing statements for petitions for review or applications for enforcement must be filed with the clerk of the court of appeals within ten (10) days of filing the petition or application. A copy of the docketing statement must be served on the opposing party or parties, and a copy of the order or judgment appealed from or for which review or enforcement is sought and a certificate of service on the opposing party or parties must be attached to the docketing statement filed with the court.

Although a party will not be precluded from raising additional issues, counsel will make every effort to include in the docketing statement all of the issues that will be presented to the court. Failure to file the docketing statement within the time set forth above will cause the court to initiate the process for dismissing a case under Local Rule 45.

If an opposing party concludes that the docketing statement is in any way inaccurate or incomplete, he or she should so inform the clerk's office in writing, including his or her additions or corrections, within seven (7) days of service of the docketing statement, with copies to the district court and all other parties. (Added effective June 1, 1986.)

## I.O.P. 10.1. Records on appeal.

The preparation and transmittal of the record on appeal is the obligation of the clerk of the lower court, board or agency and any questions concerning form or content should be addressed to the trial forum in the first instance. A record on appeal consists of a specific number of volumes of pleadings, transcripts, and exhibits. Parties should check with the clerk of the lower court, board or agency to determine whether everything relevant to the issues on appeal will be included initially in the record on appeal in order to obviate motions to supplement the record. The record is transmitted to the appellate court as soon as it is complete. The record is considered filed upon receipt by the court of appeals and notice of such filing is sent by the clerk to all parties. (Amended effective April 9, 1986.)

## I.O.P. 10.2. Transcripts.

(a) Responsibilities and designation.

The appellant has the duty of ordering transcript of all parts of the proceedings material to the issues to be raised on appeal whether favorable or unfavorable to appellant's position. Transcript Order forms are provided to appellant by the clerk of the district court at the time the notice of appeal is filed. Appellant should complete the form and distribute the appropriate parts of the form to the clerk of the court of appeals, the court reporter, the clerk of the district court, and the appellee.

Before the transcript order is mailed, appellant must make appropriate financial arrangements with the court reporter for either immediate payment in full or in other form acceptable to the court reporter, payment pursuant to the Criminal Justice Act, or at government expense pursuant to 28 U.S.C. § 753(f).

In cross appeals each party must order those parts of the transcript pertinent to the issues of such appeals. The parties are encouraged to agree upon those parts of the transcript jointly needed and to apportion the cost, with additional portions being ordered and paid for by the party considering them essential to that party's appeal.

If the entire transcript of proceedings is not to be prepared, the appellant's Docketing Statement filed pursuant to I.O.P. 3.2 may constitute the statement of issues required by FRAP 10(b)(3).

(b) Monitoring and receipt by clerk.

Failure to order timely a transcript, failure to make satisfactory financial arrangements with the court reporter, or failure to specify in adequate detail those proceedings to be transcribed will subject the appeal to dismissal by the clerk for want of prosecution pursuant to Local Rule 45 and I.O.P. 45.3. The clerk's office is charged with monitoring the status of transcripts pending with court reporters.

(c) Statement in lieu of transcript.

The parties may prepare and sign a statement of the case in lieu of the transcript or the entire record on appeal. The use of a statement in lieu of a transcript of a hearing substantially accelerates the appellate process. The statement should contain a description of the essential facts averred and proved or sought to be proved and a summary of pertinent testimony.

(d) Guidelines for preparation of appellate transcripts in the Fourth Circuit.

An appendix to these rules contains the guidelines adopted by the Fourth Circuit Judicial Council to define the obligations of appellants, appellees, clerks of the district court, court reporters and the clerk of the court of appeals in the ordering, preparation, and filing of transcripts completed pursuant to these rules. (Amended effective April 9, 1986.)

## I.O.P. 11.1. Time limits for filing transcripts.

Although FRAP 11(b) requires that transcripts be completed within 30 days from the purchase order date, this court routinely uses instead the time limits set forth in the district court reporter management plans. All of the plans establish a 60-day period for preparation of transcripts, with the following exceptions:

(a) Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants
  (1) transcripts of 1000 pages or less shall be filed within 30 days of transcript order and completion of satisfactory financial arrangements
  (2) transcripts of more than 1000 pages shall be filed within the time ordered by the clerk of the court of appeals.

(b) Special circumstances, such as
  (1) bail appeals,
  (2) death penalty cases, or
  (3) other expedited procedures

in which the transcript shall be filed within the time ordered by the clerk of the court of appeals. (Added effective April 9, 1986.)

**Editor's Note.** — Former I.O.P. 11.1, relating to exhibits, has been redesignated as I.O.P. 11.3.

## I.O.P. 11.2. Sanctions for court reporter's failure to file a timely transcript.

The Fourth Circuit Judicial Council has implemented a resolution of the Judicial Conference of the United States which mandates sanctions for the late delivery of transcripts. For transcripts not delivered within 60 days of the date ordered and payment received therefor, the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 90 days the reporter may charge only 80 percent of the prescribed fee with the following exception. For transcripts not delivered within the time limits set forth in I.O.P. 11.1, the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 30 days after that time the reporter may charge only 80 percent of the prescribed fee. (Added effective April 9, 1986.)

**Editor's Note.** — Former I.O.P. 11.2, relating to access of counsel to original record, has been redesignated as I.O.P. 11.4.

## I.O.P. 11.3. Exhibits.

Counsel should be aware that certain portions of the record will not be transmitted to the court of appeals as part of the record. Only documentary exhibits are routinely included in the record, and then only if they are not heavy or bulky. If bulky documents and physical exhibits are required by a party for oral argument, the party must make advance arrangements with the clerks of both courts for their transportation and receipt. Such arrangements are best made after the completion of the briefing schedule on appeal and receipt of notice of oral argument. (Amended effective April 9, 1986.)

**Editor's Note.** — I.O.P. 11.3 was formerly designated as I.O.P. 11.1.

## I.O.P. 11.4. Access of counsel to original record.

Counsel desiring to use the record on appeal in preparing their case should make arrangements with the clerk of the district court before the record is transmitted to the court of appeals. It is possible that the record may be temporarily retained in the district court. After transmission to the court of appeals the record may be withdrawn. Upon proper application the record may be returned to the trial court or the nearest district court clerk's office for counsel's review. Law professors representing indigents by court appointment may request that the record be sent to the law school for their review. (Amended effective April 9, 1986.)

**Editor's Note.** — I.O.P. 11.4 was formerly designated as I.O.P. 11.2.

## I.O.P. 34.1. Court sessions and notification to counsel.

The court sits in Richmond, Virginia for five consecutive days each month from October through June for its regular court terms. Court sessions are usually the first full week of each month, but adjustments are made because of holidays and elections, and special sessions may be scheduled at any time, anywhere in the circuit. Panels of the court also regularly sit the first full week of a scheduled month in Baltimore, Maryland, usually at least 4 times per year. On specified days during the summer months, panels sit in various cities throughout the circuit.

The court initially hears and decides cases in panels consisting of three judges with the chief judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.

Attorneys appearing for oral argument must register with the clerk's office on the morning of argument to learn of courtroom assignment, order of appearance, and allocation of oral argument time. Counsel not already a member of the Fourth Circuit bar will be admitted to practice before the Court at that time. Registration commences at 8:00 a.m. and must be completed by 8:30 a.m. unless counsel is instructed otherwise.

The Court convenes at 9:30 a.m., with the exception of Friday, when it convenes at 9:00 a.m.

Preparation for the argument calendar begins in the clerk's office approximately two months prior to argument. Therefore, if a case is approaching maturity and an attorney anticipates a possible conflict, the clerk's office should be notified in writing at the earliest possible moment. Once a case has been scheduled for argument, it will be removed from the argument calendar only for extreme unforeseeable problems. Excusal from an established oral argument date is not granted because of a prior professional commitment. Although a case will not be removed from the calendar because of a scheduling conflict by counsel after the notification of oral argument has been issued, the court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present. (Amended effective April 9, 1986.)

## I.O.P. 34.2. Calendar assignments and panel composition.

The clerk of court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three judge panels provided by a computer program designed to achieve total random selection.

The composition of each panel usually changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. Every effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal by way of a preargument motion, or a previous decision concerning the matter, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to the hearing panel. The varied assignment of judges to panels and the independent assignment of varied cases to panels is designed to assure the opportunity for each judge to sit with all other judges an equal number of times, and that both the appearance and the fact of presentation of particular types of cases to particular judges is avoided. (Amended effective April 9, 1986.)

## I.O.P. 36.4. Unpublished dispositions.

Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, to litigants in the case not represented by counsel, and to individuals and institutions on a subscription list maintained by the clerk. Any individual or institution may receive copies of all published and unpublished opinions of the court by paying an annual subscription fee for this service. In addition, copies of all published and unpublished opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrates, clerks of district court, United States Attorneys and Federal Public Defenders upon request. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the clerk's office and a copy may be obtained from the clerk's office for $2.00. (Amended effective December 4, 1985.)

## I.O.P. 46.1. Admission to practice.

Only attorneys admitted to the bar of this court may practice before the court. An attorney may be named on a brief filed in this court without being admitted to the bar of the Fourth Circuit, provided that at least one lawyer admitted to practice in this court also appears on the brief. Any other document submitted by an attorney who is not a member of the bar of the Fourth Circuit will be accepted for filing conditioned on his or her qualifying for membership within a reasonable time.

Each applicant for admission to the bar of this court shall file with the clerk an application on the form approved by the court and furnished by the clerk. Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. A qualified attorney may be admitted upon personal appearance in open court. It is not necessary that an applicant appear in open court for the purpose of being admitted unless the court shall otherwise order.

The requisite $30.00 fee must accompany the application, but attorneys appointed by the court to represent a party in forma pauperis, law clerks to judges of the court and counsel for the United States and any agency thereof who have a case pending before this court shall be admitted to the bar of this court without the payment of an admission fee.

Fees collected by the clerk from applicants for admission shall be deposited in a bank designated by the court and shall be used for the benefit of the bench and bar in the administration of justice. A certificate indicating that an attorney has been admitted to practice before the Fourth Circuit will be sent to counsel by mail after admission. (Amended effective January 1, 1986.)

## I.O.P. 46.6. Rules of disciplinary enforcement.

a. A member of the bar of this court may be disciplined by this court as a result of

(1) Conviction in any court of the United States, the District of Columbia, or any state, territory or commonwealth of the United States, of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, or theft;

(2) Imposition of discipline by any other court of whose bar the attorney is a member, or an attorney's disbarment by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;

(3) Conduct with respect to this court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal Rules of Appellate Procedure, the local rules and internal operating procedures of this court, or orders or other instructions of this court; or

(4) Any other conduct unbecoming a member of the bar of this court.

b. Discipline may consist of disbarment, suspension from practice before this court, monetary sanction, removal from the roster of attorneys eligible for appointment as court-appointed counsel, reprimand, or any other sanction that the court may deem appropriate. Disbarment is the presumed discipline for conviction of a crime specified in paragraph a(1) above. The identical discipline imposed by another court is presumed appropriate for discipline taken as a result of that other court's action pursuant to paragraph a(2). A monetary sanction imposed on disciplinary grounds is the personal responsibility of the attorney disciplined, and may not be reimbursed by a client.

c. The clerk reviews reports received from other courts concerning discipline imposed on members of the bar of this court. He refers to the court all disbarments, suspensions, resignations during the pendency of misconduct investigations, and other actions sufficient to cast doubt upon the member's continuing qualification to practice before this court.

d. The clerk issues a notice to show cause why a member of the bar shall not be disciplined by this court upon receipt of official notification of an attorney's conviction of a crime specified in paragraph a(1) or of the imposition of discipline by another court referred to this court pursuant to paragraph c above, or upon the court's determination that cause may exist for discipline pursuant to paragraphs a(3) or a(4). Such notice is sent by certified mail, directs that a response be filed within 30 days of the date of the notice, and directs that the attorney complete and return to the clerk within that time a declaration of the names and addresses of other bars to which he or she is admitted, using the form supplied by the clerk, whether or not the attorney chooses otherwise to respond to the notice. The clerk also appends a copy of I.O.P. 46.6.

e. Upon receiving official notification that a member of the bar has been convicted of a crime specified in paragraph a(1), the clerk automatically will issue an order suspending the attorney's privilege to practice before this court pending the court's determination of appropriate discipline.

f. An attorney to whom a notice to show cause has been sent may consent to disbarment, by filing with the clerk an affidavit stating that the attorney desires to consent to disbarment and that:

(1) the attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;

(2) the attorney is aware that there is a presently pending proceeding involving allegations that there exist grounds for the attorney's discipline the nature of which the attorney shall specifically set forth;

(3) the attorney acknowledges that the material facts so alleged are true; and

(4) the attorney so consents because the attorney knows that he or she cannot successfully defend him or herself.

The order disbarring the attorney on consent is a matter of public record. However, the affidavit will not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

g. If the attorney fails to respond to the notice within 30 days, or such other time as the court shall allow, the clerk enters an order imposing the presumptive discipline. If no presumptive discipline is specified for the conduct, the clerk notifies the court of the attorney's non-response and the court takes such action as it deems appropriate.

h. All matters pertaining to discipline of attorneys are submitted to the court's Standing Panel on Attorney Discipline, which consists of three active circuit judges, each of whom is appointed by the Chief Judge to serve on the Panel for a three year term. The initial members of the Standing Panel are appointed for terms of one, two, and three years so that the Panel members' terms are staggered for continuity of decisionmaking. If any member of the Standing Panel is unable to hear a particular matter, the clerk randomly designates another active circuit judge to the Panel for the purpose of disposing of that matter.

i. The Standing Panel considers all materials submitted by an attorney to whom notice to show cause has issued. The Panel may request further information from a court that has previously imposed discipline on an attorney, or from its disciplinary agency. A copy of any such information is made available to the attorney or to his or her counsel. Should an attorney request a hearing on the matter, it will be heard by the Standing Panel at a time and place of its choosing.

j. The court may at any time appoint counsel to investigate or prosecute a disciplinary matter, or to represent an indigent attorney instructed to show cause. The court prefers to appoint as prosecuting counsel the disciplinary agency of the highest court of the state in which the attorney maintains his or her principal office. However, if the state disciplinary agency declines appointment, or the court deems other counsel more appropriate, it may appoint any other member of the bar as prosecuting counsel. Counsel appointed either for prosecution or defense will be compensated for his or her services according to the Court's plan for appointment of counsel in criminal cases, from the account established in I.O.P. 46.6(1)(5) or from other funds available to the court should such account have insufficient funds.

k. The court's order imposing discipline will set forth the nature of the discipline imposed; if disbarment or suspension from practice before the court, the terms upon which reinstatement will occur or be considered by the court; and any instructions to the clerk concerning the notification of the court's action to be given to other courts or official bodies.

l. The clerk is responsible for:

(1) automatically initiating show cause proceedings when official notice of an attorney's conviction of a crime specified in paragraph a(1) or discipline by another court pursuant to paragraph c is brought to his attention;

(2) bringing to the attention of the Standing Panel instances of violations by members of the bar of this court of the Federal Rules of Appellate Procedure, this court's local rules and internal operating procedures, or this court's orders or other instructions that may warrant discipline;

(3) obtaining declarations of the names and addresses of other bars of which an attorney possibly subject to discipline by this court may be a member;

(4) unless directed otherwise by the court, within 10 days of the imposition of discipline upon a member of the bar of this court, notifying all other courts of whose bar the attorney reports that he or she is a member, and the American Bar Association's National Disciplinary Data Bank, of the court's action, enclosing a certified copy of the court's order; and

(5) establishing and maintaining a separate fund held by the clerk, as trustee, and not on behalf of the United States, for the receipt of monies paid into the court as directed by disciplinary orders and for the payment of the costs of such proceedings. (Added effective February 5, 1986.)

# Index to Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit

# RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Index follows these rules.

I. General Rules
II. Civil Rules
III. Criminal Rules
IV. Magistrates
V. Admiralty and Maritime Claims

## Rules of Court

### I. General Rules



### II. Civil Rules



### III. Criminal Rules



### IV. Magistrates



### V. Admiralty and Maritime Claims

# I. General Rules

## Rule 1.00 Scope and Citation of Local Rules.

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67, FRCP, and the adoption of Rules 72 to 76, FRCP, noting local rule changes to related rules, and suggesting further changes, see 20 Wake Forest L. Rev. 819 (1984).

## Rule 2.00 Attorneys.

2.03: *Procedure for Admission.* Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(a) Is a member in good standing of the bar of the Supreme Court of North Carolina, is a resident of North Carolina, and maintains an office in North Carolina; and,

(b) Has studied the Federal Rules of Civil Procedure and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a judge or magistrate upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate and the applicant shall file the application, accompanied by a fee of $25.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $25.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client until the applicant has taken the oath. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 2.00 was not affected by the amendment, only 2.03 is set out.

### CASE NOTES

**Cited** (As to Rule 2.04) in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985).

## Rule 3.00 Court Schedule and Conduct of Business.

3.03: *Assignment of Cases to a Division.*

(a) *Civil Actions.* The clerk shall assign all civil actions to a division when the action is filed or removed. If one or more plaintiffs are residents of this District, the clerk shall assign the case to the division in which the first named plaintiff resides. If no plaintiff resides in the District and one or more defendants reside in the District, the clerk shall assign the action to the division in which the first named defendant resides. In the event no party resides in the District but the claim is alleged to have arisen in the District or to involve real property in the District, the clerk shall assign the action to the division in which such claim is alleged to have arisen or in which the real property is situated. In all other instances, a case shall be assigned to a division in the discretion of the clerk.

(c) *Residence of Corporation.* For the purposes of this Local Rule, a corporate plaintiff shall be deemed to reside in the state in which it was incorporated and in the district and division in which it has its principal office; and, a corporate defendant shall be deemed to reside in the division in which the corporation is alleged (1) to be incorporated and have its principal office, or (2) to be licensed to do business or (3) to be doing business.

(Amended effective January 1, 1986.)

3.04: *Court in Continuous Session.* This court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties. (Amended effective January 1, 1986.)

3.06: *Forms of Pleadings, Motions and Documents.* All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(c) bear, except for initial filing, the case number assigned by the clerk;

(h) be signed by counsel as required by Local Rule 2.04;

(j) have each page number sequentially. The following forms are examples to be followed:

**THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**WILMINGTON DIVISION**
**No. ___ - _____ - _____**

(Civil)

JAMES T. SMITH, )
)
Plaintiff )
) OFFER OF JUDGMENT
vs. ) Rule 68, F.R.Civ.P.
)
AARON R. JONES, et al., )
)
Defendants )

**OR**

(Criminal)

UNITED STATES OF AMERICA, )
)
vs. ) MOTION TO TRANSFER
) Rule 21(a), F.R.Crim.P.
AARON T. JONES, )
)
Defendant )

(Closing)

This ____ day of January, 1980.

John B. Counselor
Attorney for Defendant
Abbot, Ball and Counselor
Attorneys at Law
200 Main Street
Post Office Box 50
Raleigh, North Carolina 27602
A/C(919) 878-8787

OF COUNSEL:
James M. Jones
Attorney for Defendant
Jones, Jones and Jones
Attorneys at Law
1000 Broadway
Post Office Box 500
New York, New York 10050
A/C(212) 555-1212
(Amended effective January 1, 1986.)

3.07: *Filing and Service of Papers.* Unless otherwise specifically provided for, the original of all pleadings and other papers required to be filed or served shall be filed with the clerk in the office of the clerk in Raleigh, Fayetteville, New Bern or Wilmington regardless of the division to which the case is assigned. When the law requires a proceeding to be heard and determined by a district court of three judges, pleadings and other documents shall be filed in triplicate. In all cases, whenever a pleading (subsequent to the complaint) or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in Rule 5(b), F.R. Civ. P. (Amended effective January 1, 1986.)

3.08: *Discovery Materials Not to Be Filed Unless Ordered or Needed.* Depositions upon oral examination and interrogatories, requests for documents, requests for admissions, and answers and responses thereto are not to be filed unless by order of the court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court if needed or so ordered. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 3.00 was not affected by the amendment, only 3.03(a) and (c), 3.04, 3.06(c), (h) and (j), 3.07 and 3.08 are set out.

**Editor's Note.** — By amendment effective January 1, 1986, former Rules 3.08 and 3.09 were renumbered as 3.07 and 3.08, respectively.

## Rule 4.00 Motion Practice.

4.01: *Time for Filing.* All motions in civil cases except those relating to the admissibility of evidence at trial must be filed on or before 30 days following the conclusion of the period of discovery. If an extension of the original period of discovery is approved by the court, the time for filing motions is automatically extended to 30 days after the new date. (Amended effective January 1, 1986.)

4.02: *General Requirements.* All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Procedure and in Local Rule 3.06. Time for the filing of pre-trial motions in criminal cases is governed by Local Rule 44.00. (Amended effective January 1, 1986.)

4.03: *Motions Relating to Discovery and Inspection.* No motions to compel discovery will be considered by the court unless the motion sets forth, by item, the specific question, interrogatory, etc., objected to, along with the grounds supporting or in opposition to the objection. A discovery motion in a criminal action (Rule 16, F.R. Crim. P.) shall state that a request for discovery and inspection was made and denied. (Amended effective January 1, 1986.)

4.04: *Supporting Memoranda.* Except for motions which the clerk may grant as specified in Local Rule 9.00, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 5.01. Where appropriate, motions shall be accompanied by affidavits or other supporting documents. (Amended effective January 1, 1986.)

4.05: *Responses to Motions.* Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 5.01 and may be accompanied by affidavits and other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 5.01 and, when appropriate, by affidavits and other supporting documents. Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Procedure. In the event no response is filed, the court may proceed to rule on the motion. (Amended effective January 1, 1986.)

4.06: *Replies.* Replies to responses are discouraged. However, a party desiring to reply to matters raised initially in a response to a motion or in accompanying supporting documents shall file the reply within ten days after service of the response, unless otherwise ordered by the court. (Amended effective January 1, 1986.)

4.07: *Affidavits.* Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties. However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(a) the facts relate solely to an uncontested matter; or

(b) the facts relate solely to a matter of formality and there is no reason to believe the substantial evidence will be offered in opposition to the facts; or

(c) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(d) the refusal to accept the affidavit would work a substantial hardship on

the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party. (Amended effective January 1, 1986.)

4.08: *Hearings on Motions.* Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without hearing. (Amended effective September 2, 1980; effective January 1, 1986.)

4.09: *Frivolous or Delaying Motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion. (Amended effective January 1, 1986.)

**Editor's Note.** — By amendment effective January 1, 1986, Rules 4.00 to 4.08 were renumbered as 4.01 to 4.09, respectively.

CASE NOTES

**Cited** (As to Rule 4.05) in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985).

## Rule 5.00 Supporting Memoranda.

5.01: *Form and Content.* A memorandum shall be in the form prescribed by Local Rule 3.06 and shall contain:
(Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 5.00 was not affected by the amendment, only the introductory language of 5.01 is set out.

## Rule 7.00 Release of Information to News Media.

7.01: *Court Personnel.* All court personnel, including but not limited to, the marshal and deputy marshals and office personnel, the clerk and deputy clerks and office personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrates' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 7.00 was not affected by the amendment, only 7.01 is set out.

## Rule 9.00 Powers and Duties of the Clerk.

9.03: *Orders and Judgments.* The clerk or deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(a) Consent orders for substitution of attorneys.

(i) Certification of law students and supervising attorneys pursuant to Local Rule 13.00.

(Amended effective January 1, 1986.)

9.06: *Court Libraries.* The clerk shall maintain for the court and the general use of the members of the bar of this court the court libraries in the district. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court. (Amended effective January 1, 1986.)

9.07: *Jurisdictional Agreements with Other Courts.* The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of such agreements shall be furnished to counsel upon request. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 9.00 was not affected by the amendment, only 9.03 (a) and (i), 9.06 and 9.07 are set out.

# II. Civil Rules

## Rule 24.00 Civil Discovery.

24.03: *Form of Interrogatories, Responses and Objections.* All interrogatories shall be served on opposing counsel. Three copies shall be served on counsel for the respondent. There shall be sufficient space following each question in which the respondent shall state the response. If the space provided is not sufficient, additional pages shall be attached. An objection to an interrogatory shall be made by stating the objection and the reason therefor in the space provided for the response. Before serving the interrogatories containing the responses and objections, if any, the responding party shall attach thereto a cover sheet containing a statement (1) that each response separately and fully answers each interrogatory, except those to which objections are made, and (2) the capacity, if any, in which such respondent is acting, which statement shall be signed and verified by the respondent. Where there are objections, there shall be attached to the interrogatories a second sheet, signed by counsel making such objection, stating the number of each such interrogatory and incorporating by reference the reason stated for each objection. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 24.00 was not affected by the amendment, only 24.03 is set out.

## Rule 25.00 Final Civil Pre-Trial Conference.

25.03: *Form of Pre-Trial Order.* The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by roman numerals, as indicated:

(b) II. *Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(d) IV. *Designation of Pleadings and Discovery Materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and requests for admissions that each party may offer at trial by reference to document volume, page number, and line. Objection by opposing counsel shall be noted by document volume, page number and line, and reasons for such objections shall be stated.

(Amended effective January 1, 1986.)

25.04: *Conduct of the Final Pre-Trial Order.*

(Amended effective January 1, 1986.)

25.05: *Sample Pre-Trial Order.* A pre-trial order in the following form shall be sufficient to comply with these rules:

| | | |
|---|---|---|
| JOHN DOE, by his guardian ad litem, JANE DOE, Plaintiff | ) | No. 82-01-CIV-5 |
| v. | ) | **PRE-TRIAL ORDER** |
| XYZ CORPORATION, Defendant | ) | |

Date of Conference: August 12, 1982

Appearances: John Y. Lawyer, Raleigh, North Carolina for plaintiff; Sam X. Attorney, Fayetteville, North Carolina for defendant.

**I. STIPULATIONS.**

A. all parties are properly before the court;
B. the court has jurisdiction of the parties and of the subject matter;
C. all parties have been correctly designated;
D. there is no question as to misjoinder or nonjoinder of parties;
E. plaintiff, a minor, appears through his guardian;
F. **Facts:**
   1. Plaintiff is a citizen of Wake County, North Carolina.
   2. Defendant is a New York corporation, licensed to do business and doing business in the state of North Carolina.
G. **Legal Issues:**
   May a nine-year old minor be guilty of contributory negligence?
H. **Factual Issues:**
   1. Was plaintiff injured and damaged by the negligence of the defendant?

2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

**II. CONTENTIONS.**

A. Plaintiff

1. **Facts:**
   (a) That Richard Roe was driving defendant's truck as defendant's agent.
   (b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.
2. **Factual Issues:**
   What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant

1. **Facts:**
   That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.
2. **Factual Issues:**
   Did plaintiff, by his own negligence, contribute to his injury and damage?

**III. EXHIBITS.**

A. Plaintiff

| Number | Title | Objection |
|---|---|---|
| 1 | Patrol Report | Hearsay |
| 2 | Photo of Plaintiff | |

B. Defendant

| Number | Title | Objection |
|---|---|---|
| 1 | Photo of Scene | |
| 2 | Scale Model | |

**IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS.**

A. Plaintiff

| Document | Portion | Objection | Reason |
|---|---|---|---|
| Plaintiff's first set of interrogatories | Nos. 1, 8 and 9 | No. 8 | Privilege |
| Deposition of Richard Roe | Vol. 1, line 6, p. 1 thru line 5, p. 6 | Line 6, p. 1 thru line 2, p. 7 | Hearsay |

B. Defendant

None

**V. WITNESSES.**

A. Plaintiff

| Name | Address | Proposed Testimony |
|---|---|---|
| John Jones | 615 Rains Street<br>Raleigh, N.C. | Facts surrounding accident, extent of |
| Frank Flake | Selma, N.C. | Speed of defendant's vehicle, intoxication of driver |
| Joe Rock | Temple, AR. | |

B. Defendant
All witnesses listed by plaintiff.

| Name | Address | Proposed Testimony |
|---|---|---|
| Sam Smith | 4 Appian Way<br>Rome, Italy | Facts surrounding the theft by driver of the vehicle |

TRIAL TIME ESTIMATE: _____ days

_____
JOHN Y. LAWYER
Counsel for Plaintiff

_____
SAM X. ATTORNEY
Counsel for Defendant

APPROVED BY:

_____
J. RICH LEONARD
U.S. Magistrate

_____, 1982
(Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 25.00 was not affected by the amendment, only 25.03 (b) and (d), the catchline of 25.04, and 25.05 are set out.

## Rule 27.00 Civil Trials.

27.01: *Opening Statements.* At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court and the jury the following:

(a) the substance of the claim, counterclaim, crossclaim or defense; and

(b) what counsel contends the evidence will show. Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 27.00 was not affected by the amendment, only 27.01 is set out.

**Rules 29.00 to 40.00:** Reserved for future purposes.

## III. Criminal Rules

### Rule 43.00 Criminal Pre-Trial Discovery and Inspection.

Rule 43.01: *Criminal Pre-Trial Conference.* Within 20 days after indictment or initial appearance, whichever comes later, the United States Attorney shall arrange and conduct a pre-trial conference with counsel for the defendant.

At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(a) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(b) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(c) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(d) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(e) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(f) to inspect, copy or photograph any exulpatory evidence. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 43.00 was not affected by the amendment, only 43.01 is set out.

### Rule 45.00 Publicity in Criminal Matters.

45.04: *Statements During Jury Selection or Trial.* During the selection of a jury or the trial of a criminal matter, an attorney or a law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making any extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that the attorney may quote from or refer without comment to public records of the court in the case. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 45.00 was not affected by the amendment, only 45.04 is set out.

## IV. Magistrates

### Rule 62.00 Authority of Magistrates.

62.01: *Duties under 28 U.S.C. § 636(a).* A magistrate is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(b) administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and

(Amended effective January 1, 1986.)

62.09: *Other Duties.* A magistrate is also authorized to:

(o) perform any additional duty consistent with the Constitution and laws of the United States. (Amended effective January 1, 1986.)

**Only Part of Rule Set Out.** — As the rest of Rule 62.00 was not affected by the amendment, only 62.01(b) and 62.09(o) are set out.

## V. Admiralty and Maritime Claims

### Rule 80.00 Title and Scope

These rules are entitled Admiralty Rules and may be cited as "Local Admiralty Rules" or "LAR". They apply to the maritime and admiralty proceedings as defined in Supplemental Rule A of the Federal Rules of Civil Procedure. The Local Rules of the United States District Court for the Eastern District of North Carolina apply to all civil cases, including admiralty and maritime proceedings, but if a local rule is inconsistent with an admiralty rule, the admiralty rule shall control. As used in these LAR, "court" means a U. S. District Judge or a U. S. District Magistrate. (Amended effective January 1, 1986.)

### Rule 81.00 Process

(a) *Order Authorizing the Clerk to Issue Process of Arrest, Attachment or Garnishment*

Except in actions by the United States for forfeitures, before the clerk will issue a summons and process of arrest, attachment or garnishment to any party, including intervenors, under Supplemental Rules B and C, the pleadings, the affidavit required by Rule B, and accompanying supporting papers must be reviewed by the court. The clerk may refer a motion under this provision to any magistrate or judge of the court who is reasonably available, regardless of the judge to whom the action is assigned. The motion may be heard and the decision thereon communicated to the clerk telephonically. If the court finds the conditions set forth in Rules B or C appear to exist, as appropriate, the court shall authorize the clerk to issue process. Supplemental process or alias process may thereafter be issued by the clerk upon application without further order of the court.

(1) *Order*

Upon approving the application for arrest, attachment or garnishment, the court will issue an order to the clerk to issue such process. The proposed form of order authorizing the issuance of such process and the proposed process itself shall be submitted to the court or the clerk before the court's review.

(2) *Exigent Circumstances*

If the plaintiff or his attorney certifies by affidavit submitted to the clerk that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant of arrest or process of attachment and garnishment. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for arrest of the vessel or other property without requiring a certification of exigent circumstances.

(b) *Return of Process — Supplemental Rules C and D*

Unless otherwise ordered by the court, all process from this court within the scope of Supplemental Rules C and D, F.R.Civ.P. shall be returnable (1) by claim within ten days after execution of the process and by motion or answer within twenty days following claim, or (2) by both claim and motion or answer within thirty days following execution of the process.

(c) *Return of Process — Supplemental Rule B*

Unless otherwise ordered by the court, Rule 9(h), F.R.Civ.P., process from this court in personam shall be by civil summons returnable twenty days after service of the process except process within the contemplation of Supplemental Rule B, F.R.Civ.P. which shall be in conformity therewith.

(d) *Registry of Vessel Information*

Whenever a vessel is to be served, the party seeking service shall inform the Marshal of the registry of the vessel to be served, provided, however, failure to so inform the Marshal shall not be cause for the Marshal to refuse to serve the said vessel or in any way invalidate service of process. (Amended effective January 1, 1986.)

## Rule 82.00 Issuance of Process

(a) *Intangible Property.*

(1) *Issuance and Effect of Summons.* The summons issued pursuant to Supplemental Rule C(3) shall direct the person having control of the funds or other intangible property to show cause no later than ten (10) days after service why the funds or other property should not be delivered to the court to abide the judgment. The court, for good cause shown, may shorten or lengthen the time. Service of the summons has the effect of an arrest of the property and brings it within the control of the court.

(2) *Payment to Marshal.* The person who is served may deliver or pay over to the Marshal the property or funds proceeded against, or a part thereof, sufficient to satisfy the claim. If such payment is made, the person served is excused from any duty to show cause.

(3) *Manner of Showing Cause.* The claimant of the property may show cause why the property should not be delivered to the court by serving and filing a claim as provided in Supplemental Rule C(6) within the time allowed to show cause, and by serving and filing an answer to the complaint within twenty (20) days thereafter.

(4) *Effect of Failure to Show Cause.* If a claim is not filed within the time stated in the summons, or an answer is not filed within the time allowed under this Rule, the person who was served shall deliver or pay to the Marshal the property or funds proceeded against, or a part thereof, sufficient to satisfy plaintiff's claim.

(b) *Seizure of Property Already in Custody of an Officer of the United States.*

In addition to the requirements of Supplemental Rule C(3), where property in the custody of an officer or employee of the United States is to be arrested or attached, the Marshal shall deliver a copy of the complaint and warrant for arrest, or summons and process of attachment, to such officer or employee or, if the officer or employee is not found within the district, then to the custodian of the property within the district. The Marshal shall notify such officer, employee or custodian not to relinquish such property from custody until ordered to do so by the court.

(c) *Use of State Procedures.*

When the plaintiff invokes a state procedure to attach or garnish property under Federal Rule 4(e), the process of attachment and garnishment shall so state.

(d) *"Not [Found] Within the District" Defined.*

The phrase "not found within the district" in Supplemental Rule B(1) means that, in an in personam action, the defendant cannot be served with the summons and complaint as provided in F.R.Civ.P. 4(d). (Amended effective January 1, 1986.)

## Rule 83.00 Post Arrest Procedure

(a) Whenever property is arrested, attached or garnished, any person claiming an interest in the property shall be entitled to a prompt hearing before the court on notice to the party bringing the arrest, attachment or garnishment and to all other parties who have appeared in the action. The hearing shall be noticed and scheduled as is a hearing on a request for temporary restraining order. At the hearing, the party that obtained the arrest, attachment or garnishment shall show cause why the arrest, attachment or garnishment order should not be vacated forthwith or other appropriate relief granted.

(b) If the arrest, attachment or garnishment was obtained under a certification of exigent circumstances, the party obtaining the arrest, attachment or garnishment shall have the burden to show that exigent circumstances existed.

(c) This Rule shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. Sections 603 and 604 or to action by the United States for forfeitures. (Amended effective January 1, 1986.)

## Rule 84.00 Publication

(a) Publication required by Supplemental Rule C(4), F.R.Civ.P. shall be made once, without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina

All Other Divisions:

The News and Observer, Raleigh, North Carolina

(b) If the property arrested is not released within ten days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within seventeen days after execution of process.

(c) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any federal statute:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Caption of Case
NOTICE: The United States Marshal, Eastern District of North Carolina, has arrested the (Vessel and appurtenances) (Property) in the above causes, civil and maritime for (nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.) amounting to ($ (and nature of unliquidated items)). Process returnable on (month, day and year, i.e., thirty days following execution of process as measured by Rule 6(a), F.R.Civ.P.) at the (name of courthouse), (city), (state), and any person claiming any interest therein must appear no later than that date and file written claims, answer or other defense, in person, or by attorney, or default and condemnation will be ordered.
DATED at (city of publication), (state). (month, day and year of publication).
(Name)
(Address)
(Attorney(s) for
(Plaintiff)(Intervenor)

(d) Plaintiff or intervenor will cause to be furnished to the Marshal, at the time process issues in Supplemental Rules B, C and D, F.R.Civ.P. actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such Marshal, together with self-addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The Marshal will promptly cause same to be completed and mailed after execution of process.

(e) Plaintiff shall effect publication required by Supplemental Rule F(4), F.R.Civ.P. without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(f) Whenever publication is required by Supplemental Rules C(4) and F(4), F.R.Civ.P. plaintiff or intervenor shall cause to be filed with the clerk, not later than the return date, sworn proof of publication by or on behalf of the publisher or the editor in charge of legal notices of the newspaper in which published, together with a copy of the proof of publication, or publication or reproduction thereof. (Amended effective January 1, 1986.)

## Rule 85.00 Stipulations for Costs and Security

(a) *Costs and Security.* In actions where there is sought, in whole or in part, a remedy listed in Supplemental Rule A of the Supplemental Rules For Certain Admiralty and Maritime Claims, F.R.Civ.P., no initial pleading seeking such remedy, or claim pursuant to Supplemental Rule F(5), F.R.Civ.P. shall be filed unless the party offering the same shall first file a stipulation for costs in the sum of $250.00, or in case two or more vessels are jointly or severally proceeded against, a sum equal to $250.00 per vessel, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. In all other admiralty and maritime actions, no initial complaint, whether original or interlocutory, shall be filed by any party, unless the party offering the same shall first file a stipulation for costs in the sum of $100.00, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. All stipulations shall be with at least one surety resident in this district. Any incorporated surety company duly authorized to do business in this district may be accepted as such surety. In the place of the stipulation for costs with surety, a party may deposit the necessary amount in the registry of the court accompanied by a statement conditioned as above, referring to such deposited amount.

(b) *Seamen.* Seamen suing as provided in 28 U.S.C. Section 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

In all actions in rem brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. Section 1916, the Marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the Marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the Marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of the same on the vessel.

(c) *Increase or Decrease in Security.* At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(d) *Deposit Required Before Seizure.* Any party, including any intervenor, who seeks arrest, attachment or garnishment of property in an action governed by Supplemental Rule E and Federal Rule 4(e) shall deposit with the Marshal the sum estimated by the Marshal to be sufficient to pay the fees and expenses of arresting, attaching, or garnishing and keeping the property for at least ten days, or such lesser amount as the Marshal deems sufficient. The Marshal is not required to execute process of arrest, attachment or garnishment until such deposit is made.

(e) *Additional Deposits Required After Seizure.* Any party who has caused the Marshal to arrest, attach or garnish property shall advance additional sums from time to time as required by the Marshal to pay the fees and expenses of the Marshal until the property is released or disposed of as provided in Supplemental Rule E.

(f) *Sanction for Failure to Make Deposit.* Any party who fails to make a deposit when required by the Marshal may be subject to sanctions including the release of the vessel. (Amended effective January 1, 1986.)

## Rule 86.00 Stipulations and Undertakings

(a) Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed on behalf of the stipulation or obligor by his/its agent or counsel. Stipulations for costs with corporate surety need not be signed or executed by the party, but may be signed on his/its behalf by his/its agent or counsel, and shall be sufficient in any event if executed only by the surety approved by the court.

(b) If, before or after commencement of suit, all parties accept any written undertaking to respond on behalf of the vessel or other property sued in return for foregoing the arrest or stipulating to the release of such vessel or other property, the undertaking shall become a party in place of the vessel or other property sued and be deemed referred to under the name of the vessel or other party in any pleading, order or judgment in the action referred to in the undertaking. (Amended effective January 1, 1986.)

## Rule 87.00 Pleadings and Parties

(a) Every complaint filed as a Rule 9(h), F.R.Civ.P. action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(b) In actions under Supplement Rule B, C or D, F.R.Civ.P. the business telephone number and address of the plaintiff's counsel or the plaintiff, if plaintiff appears pro se, shall be included.

(c) Every complaint in Supplemental Rules B and C, F.R.Civ.P. actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amounts of unliquidated claims, including attorneys fees. The defendant or claimant may post bond pursuant to Supplemental Rule E(5) based on such allegations.

(d) In cases of salvage, the complaint shall also state to the extent known or estimated the value of the hull, cargo, freight and other property salvaged, the amount claimed, the names of the principal salvors, and that the suit is instituted in their behalf and in the behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known salvors and all persons believed entitled to share in the salvage, and also any agreement of consortship available and known to exist among them or any of them, including a copy of any such agreement. (Amended effective January 1, 1986.)

## Rule 88.00 Verification of Pleadings and Answers to Interrogatories

Every complaint and claim in Supplemental Rules B, C and D, F.R.Civ.P. actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint, claim or answers to interrogatories may be made by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of his or her knowledge, information and belief, declare that the document affirmed is true to the best of his or her knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he or she is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered. (Amended effective January 1, 1986.)

## Rule 89.00 Intervention

(a) Unless otherwise ordered by the court, anyone having a claim against a vessel or other property previously arrested, attached, or garnished shall file an intervening complaint and not an original complaint, and shall arrest, attach, or garnish the vessel or property and, further, otherwise comply with these Rules in the same manner as the initial arresting, attaching or garnishing party.

(b) Any party intervening in the proceeding shall deposit funds to pay a fair share of expenses for the safekeeping of the property. (Amended effective January 1, 1986.)

## Rule 90.00 Default in Action in Rem

(a) **Notice Required.** A party seeking a default judgment in an action in rem must show to the satisfaction of the court that due notice of the action and arrest of the property has been given:

(1) By publication, as required in LAR 84; and

(2) By service on the master or other person having custody of the property; and

(3) By delivery under Federal Rule 5(b) to every other person who has not appeared in the action and is known to have an interest in the property.

(b) **Persons with Recorded Interests.**

(1) If the defendant property is a vessel documented under the laws of the United States, plaintiff must obtain a current certificate of ownership from the Coast Guard and give notice to the persons named therein who appear to have an interest.

(2) If the defendant property is a vessel numbered as provided in the Federal Boat Safety Act, plaintiff must obtain information from the issuing authority and give notice to other persons named in the records of such authority who appear to have an interest.

(c) **Manner of Giving Notice.** A required notice, other than by publication, of the action and arrest of the property shall be given by delivery under Federal Rule 5(b). (Amended effective January 1, 1986.)

## Rule 91.00 Entry of Default

After the time limit for filing an answer has expired, the plaintiff may request an entry of default under Federal Rule 55(a). Default will be entered upon showing that:

(a) Notice has been given as required in LAR 91(a);
(b) No one has appeared to claim the property;
(c) The publication requirement under LAR 84 has been fulfilled; and
(d) The time limit for answer has expired.

The plaintiff may move for judgment under Federal Rule 55(b) at any time after default has been entered. (Amended effective January 1, 1986.)

## Rule 92.00 Custody of Property

(a) **Safekeeping of Property When Seized.** When a vessel, cargo or other property is seized, the Marshal shall take custody and arrange for adequate and necessary security for its safekeeping which may include, in the Marshal's discretion, the placing of keepers on or near the vessel, or the appointment of a facility or person as custodian of the property in lieu of the Marshal. When a vessel with crew aboard is seized, the removal of such crew shall fall within the discretion of the United States Marshal.

(b) **Cargo Handling, Repairs and Movement of the Vessel.** Upon arrest or attachment of the vessel, no cargo handling, repairs or movement of the vessel may be made without a court order except in an emergency situation in the discretion of the Marshal. Written notice shall be given to the Marshal and to all parties who have appeared prior to the application for such order, and the certificate of service of such notice shall be filed with the clerk before application is made to the court. For good cause shown, the court may direct the Marshal to allow the conduct of cargo handling, repairs, movement of the vessel or other operations on a vessel under arrest or attachment. Neither the United States nor the Marshal shall be liable for the consequence of the undertaking or continuation of any such activities during the arrest or attachment.

(c) **Motion for Change in Arrangements.** Prior to or after a vessel, cargo or property has been taken into custody by the Marshal, any party then appearing may move the court to dispense with keepers or to remove or place the vessel, cargo or other property at a specified facility, to designate a substitute custodian, or for similar relief. Notice of the motion shall be given to the Marshal and to all parties who have appeared.

(d) **Insurance.** The Marshal may order insurance to protect the Marshal, his deputies, keepers and substitute custodians from liability assumed in arresting and holding the vessel, cargo or other property and performing whatever services are undertaken to protect the vessel, cargo or other property and maintain the court's custody. The party applying for arrest of the vessel, cargo or other property shall reimburse the Marshal for premiums paid for the insurance. The party applying for removal of the vessel, cargo or other property to another location, for designation of a substitute custodian, or for other relief that will require an additional premium shall reimburse the Marshal therefor. The premiums charged for the liability insurance are taxable as administrative costs while the vessel, cargo or other property is in custodia legis. (Amended effective January 1, 1986.)

## Rule 93.00 Appraisal

(a) **Order for Appraisal.** An order for appraisal of property so that security may be given or altered will be entered by the clerk at the written request of any interested party. If the parties do not agree in writing on the selection of the appraiser, the court will appoint the appraiser.

(b) **Appraiser's Oath.** The appraiser shall be sworn to the faithful and impartial discharge of duties before any federal or state officer authorized by law to administer oaths, and a copy of the oath shall be filed with the clerk.

(c) **Appraisal.** The appraiser shall give one day's notice of the time and place of making the appraisal to the parties who have appeared in the action. The appraiser shall file the appraisal in writing with the clerk as soon as it is completed and shall serve it on all parties.

(d) **Cost of Appraisal.** Absent stipulation of the parties or order of the court to the contrary, the appraiser shall be paid by the party requesting the appraisal. Appraiser's fees shall thereafter be taxed as the court orders. (Amended effective January 1, 1986.)

## Rule 94.00 Sale of Property

(a) **Publication of Notice of Sale.** Unless otherwise ordered upon a showing of urgency, impracticality or other good cause, or as provided by law, notice of the sale of property in an action in rem shall be published daily, at least twice, the first publication to be at least one calendar week prior to date of sale and the second publication to be at least three calendar days prior to date of sale, unless otherwise ordered by the court.

(b) **Place of Sale.** The place of sale will occur at the Federal Courthouse in the division in which the property is located unless the court otherwise directs.

(c) **Payment of Bid.** The person whose bid is accepted shall immediately pay the Marshal either the full purchase price if the bid is no more than $500 or a deposit of $500 or ten percent of the bid, whichever is greater, if the bid exceeds $500. The bidder shall pay the balance of the purchase price within three court days following the sale. If an objection to the sale is filed within that time, the bidder is excused from paying the balance of the purchase price until three court days after the sale is confirmed. Payments to the Marshal shall be in cash, certified check or cashier's check. The court may specify different terms in any order of sale.

(d) **Penalty for Late Payment of Balance.** A successful bidder who fails to pay the balance of the bid within the time allowed under these rules or a different time specified by the court shall also pay the Marshal the costs of keeping the property from the date payment of the balance was due to the date the bidder pays the balance and takes delivery of the property. Unless otherwise ordered by the court, the Marshal shall refuse to release the property until this additional charge is paid.

(e) **Penalty for Default in Payment of Balance.** A successful bidder who fails to pay the balance of the bid within the time allowed is in default and the court may at any time thereafter order a sale to the second highest bidder or order a new sale as appropriate. Any sum deposited by the bidder in default shall be forfeited and applied to pay any additional costs incurred by the Marshal by reason of the forfeiture and default, including costs incident to resale. The balance of the deposit, if any, shall be retained in the registry subject to further order of the court, and the court shall be given written notice of its existence whenever the registry deposits are reviewed.

(f) **Report of Sale by the Marshal.** At the conclusion of the sale, the Marshal shall forthwith file a written report with the court of the fact of sale, the date thereof, the price obtained, the name and address of the successful bidder, and any other pertinent information.

(g) **Time and Procedure for Objection to Sale.** An interested person may object to the sale by filing a written objection with the clerk within three court days following the sale, serving the objection on all parties, the successful bidder and the Marshal, and depositing a sum with the Marshal that is sufficient to pay the expense of keeping the property for at least seven days. Payment to the Marshal shall be in cash, certified check, or cashier's check. The written objection must be endorsed by the Marshal with an acknowledgement of receipt of the deposit prior to filing with the clerk.

(h) **Confirmation of Sale Without Motion.** A sale shall stand confirmed as of course without any affirmative action by the court unless (1) written objection is filed with the court within the time allowed under these rules, or (2) the purchaser is in default for failure to pay the balance due to the Marshal. The purchaser in a sale so confirmed as of course shall present a form of order reflecting the confirmation of the sale for entry by the clerk on the fourth court day following the sale. The Marshal shall transfer title to the purchaser upon presentation of such order by the clerk.

(i) **Confirmation of the Sale on Motion.** If an objection has been filed or if the successful bidder is in default, the Marshal, the objector, the successful bidder, or a party may move the court for relief. The motion will be heard summarily by the court. The person seeking a hearing on such motion shall apply to the court for an order fixing the date and time of the hearing and directing the manner of giving notice and shall give written notice of the motion to the Marshal, all parties, the successful bidder and the objector. The court may confirm the sale, order a new sale, or grant such other relief as justice requires.

(j) **Disposition of Deposits.**

(1) **Objection Sustained.** If an objection is sustained, sums deposited by the successful bidder will be returned to the bidder forthwith. The sum deposited by the objector will be applied to pay the fees and expenses incurred by the Marshal in keeping the property until it is resold, and any balance remaining shall be returned to the objector. The objector will be reimbursed for the expense of keeping the property from the proceeds of a subsequent sale.

(2) **Objection Overruled.** If the objection is overruled, the sum deposited by the objector will be applied to pay the expense of keeping the property from the day the objection was filed until the day the sale is confirmed, and any balance remaining will be returned to the objector forthwith.

(k) **Title to Property.** Failure of a party to give the required notice of the action and arrest of the vessel, cargo or other property or required notice of the sale may afford grounds for objecting to the sale but does not affect the title of a bona fide purchaser of the property without notice of the failure. (Amended effective January 1, 1986.)

## Rule 95.00 Release of Seizures — Custodial Cost — General Bonds

(a) Property seized by the Marshal may be released as follows:

(1) By the Marshal upon the receipt of security by the Marshal, accompanied by the endorsed express authorization for release signed by the party or counsel for the party as provided by Supplemental Rule E(5)(c), F.R.Civ.P. if all costs and charges of the court and its officers shall have first been paid. Monies received as part of any cash stipulation shall be delivered by the Marshal to the clerk for deposit in the registry of the court.

(2) In action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at ten percent per annum thereon from the date claimed to be due to a date 24 months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.

(3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.

(4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.

(5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(b) The Marshal shall not deliver any property so released until costs and charges of the Marshal shall first have been paid.

(c) In any general bond as provided for by Supplemental Rule E(5)(b), F.R.Civ.P. the vessel will be identified by name, nationality, dimension, official number or registration number, hailing port and port of documentation, to the extent applicable. The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail. Execution of process against the vessel so stayed under Supplemental Rule E(5)(b), F.R.Civ.P. shall be endorsed to the Marshal as stayed pursuant to the rule. Such process shall be served by the Marshal together with a copy of the complaint on the master or other person in whose charge or custody the vessel is found and the Marshal shall make his or her return thereof. If no master or other person in charge of custody is found aboard the vessel, the Marshal shall so make his or her return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day thirty days from the date of the Marshal's attempt. The clerk will maintain a current list of vessels subject to a general bond and file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5)(b), F.R.Civ.P. (Added effective January 1, 1986.)

## Rule 96.00 Taxation of Costs

If costs shall be awarded to either or any party, then the reasonable premium or expenses paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case. In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case. (Added effective January 1, 1986.)

## Rule 97.00 Stay of Execution or of Release of Property After Judgment or Dismissal

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until ten days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said ten-day period, a further stay shall exist for a period not to exceed thirty days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same. (Added effective January 1, 1986.)

## Rule 98.00 Possessory Actions — Short Day Return

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference. (Added effective January 1, 1986.)

## Rule 99.00 Claims After Sale, How Limited

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, shall not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered. (Added effective January 1, 1986.)

# Index to Rules of the United States District Court for the Eastern District of North Carolina

# RULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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Index follows these rules.

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## Rule 101

## Philosophy of Rules

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67, FRCP, and the adoption of Rules 72 to 76, FRCP, noting local rule changes to related rules, and suggesting further changes, see 20 Wake Forest L. Rev. 819 (1984).

# RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Index follows these rules.

## I. General Rules

### Rule 1. Attorneys.

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67, FRCP, and the adoption of Rules 72 to 76, FRCP, noting local rule changes to related rules, and suggesting further changes, see 20 Wake Forest L. Rev. 819 (1984).


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